

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 695
3199080

BETWEEN	SUKHPREET WALIA SINGH Applicant
AND	AYDEN TRADING LIMITED First Respondent
AND	BETHANY URE Second Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Tobias Tohill and Keira McGregor, advocates for the Applicant
No appearance by the Respondents

Investigation Meeting: 11 July 2023 at Hamilton

Submissions Received: 17 August 2023, 17 and 20 November 2023 from the Applicant

Date of Determination: 22 November 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sukhpreet Singh was employed by Ayden Trading Limited (trading as Green Acres) as a lawnmower and gardener. Ayden Trading Limited (ATL) is a limited liability company having its registered address in Cambridge and Bethany Ure is the sole director and shareholder. Mr Singh worked for ATL from 1 March 2021 to 17 July 2022.

[2] Mr Singh says he was not paid holiday pay or final wages on termination of his employment. He also seeks wage arrears because at times he was provided with less

than his guaranteed hours of work and only paid for the hours he worked. Mr Singh also says he was not permitted to work on public holidays that fell on a weekday. He seeks orders for payment of any public holiday arrears owing to him, interest and reimbursement of the filing fee incurred in lodging this application. Penalties for failure to keep and provide wage and time records and for the inclusion of a clause in his individual employment agreement (IEA) contrary to law, namely two weeks annual leave, are also sought.

[3] An application was also made under s 142Y of the Employment Relations Act 2000 (the Act) to have Ms Ure named as a person involved in the breaches and therefore liable in respect of any breaches of employment standards.

[4] No statement in reply or evidence was lodged by ATL or Ms Ure.

The Authority's investigation

[5] For the Authority's investigation, a written witness statement was lodged from Mr Singh and he answered questions under affirmation from me. His representatives Mr Tohill and Ms McGregor made submissions. Further information quantifying the public holiday arrears was also provided on 20 November 2023.

[6] The Authority has the power to proceed if any party without good cause fails to attend and may act as fully in the matter before it as if that party had duly attended or been represented.¹ Neither ATL or Ms Ure participated in any aspect of the Authority's investigation into Mr Singh's employment with ATL.

[7] A notice of investigation was served to ATL's address for service. The notice included advice that if ATL or Ms Ure did not attend the investigation meeting, the Authority may, without hearing the evidence from either respondent, issue a determination in favour of the Applicant.²

[8] In the absence of any information from either respondent or about why they did not attend, the Authority proceeded on the basis it could act fully in the matter as if they had attended.

¹ Employment Relations Act 2000, Schedule 2 clause 12.

² Employment Relations Authority Regulations, Schedule 1, form 8.

Mr Singh's employment at ATL

[9] Mr Singh worked as a lawnmowing and gardening supervisor. He mostly worked by himself mowing lawns and completing other gardening maintenance services in the Waikato area. Sometimes he was assisted by others with larger tasks but mostly worked by himself for the duration of his employment.

[10] There was no roster as such and no set permanent days when he could expect work. Mr Singh received a list of tasks through Google Worksheets created by Ms Ure. Ms Ure would also at times notify him by text message the day before about which days he was to work. He was told to download an hours tracking application on his phone in which he recorded his start and finish times and breaks. On a Sunday Mr Singh emailed Ms Ure his hours worked from the application and she paid him the following week.

[11] As a general rule work commenced at 8.00 am and roughly finished at 4.00 pm. Due to the varying nature of the work, some start and end times would vary and be longer or shorter. In accordance with the individual employment agreement between the parties (IEA) a workday was to be no more than ten hours in total. Mr Singh said that he often worked on the weekend and his work hours varied and so did his days of work.

[12] The IEA between the parties did not have specified work days or an availability clause. Due to the outside nature of the role, if the weather was bad, Mr Singh could not work. He was regularly instructed to finish work that he could not complete during the week on the weekends.

[13] Mr Singh said they would meet before work to discuss what was on. It was during those meetings Ms Ure would ask him to work on the weekends if she needed him to work that weekend or she would text him. Mr Singh said he often told Ms Ure he had other things on but she would respond asking him to give priority to his work. Ms Ure also asked him on more than one occasion to tell her at least two weeks in advance if he had things on at the weekend.

[14] Mr Singh said he found it particularly onerous that he was often expected to work on a weekend because every day could possibly be a workday. There were additional times when during the week they could not work due to the weather and

Ms Ure asked him to work at the weekend instead. He was also asked to work at the weekend if a public holiday fell on a weekday. There was evidence in a text message of an example of a time when Mr Singh had a sick day during the week and he was asked to work at the weekend to make up for the sick day.

[15] The IEA between the parties is dated 23 February 2021. It provided Mr Singh was to be paid \$23 per hour, he was to work a minimum of 35 hours per week and he was required to give two weeks' notice.

[16] The hours of work provided:

The employee will work for a max of 10 hours a day, as needed on a full time contract.

Work will start varying in the week according to workloads but as a general rule work commences at 8am and finishes roughly at 4pm due to the varying nature of the work some start and end times will vary longer or shorter but no more than 10 hours in total.

[17] The public holiday clause is notable because in contrast to s 12 of the Holidays Act 2003 it allowed for agreement to not work on what would otherwise be a working day by referencing public holidays that fall on days Mr Singh was rostered to work. That clause provided:

The employer may ask the employee to work on a public holiday, but they may decline. However, the employee agrees not to work on any public holiday in his roster unless asked to do so.

[18] The annual leave clause is also notable because it only provided for two weeks annual leave when s 16 of the Holidays Act clearly provides to all employees after 12 months of continuous service not less than four weeks' paid annual holidays.

[19] Mr Singh was paid weekly and said initially he received his pay regularly but after a few months Ms Ure did not pay him on time. He reminded her two to three times to pay him. Ms Ure told him she forgot and Mr Singh said this became more regular as time went by. Mr Singh's bank statements confirm he received irregular payments from ATL.

[20] On 13 February 2022, Mr Singh emailed Ms Ure because his weekly pay for the previous week was late and he hadn't been paid for a public holiday included in that particular payslip. Then on 13 March 2022 Mr Singh emailed Ms Ure because his weekly pay for the previous week was late again. He had also had a sick day and noticed

there was no payment for that day included in the pay slip. On 6 July 2022 he contacted Ms Ure because his weekly pay for the previous week was late.

[21] Mr Singh said he struggled to make ends meet because he was not paid his guaranteed hours. In terms of being expected to work on any day of the week at short notice, he became increasingly tired because he could be required to work on any day of the week. Review of some of his time sheets show that over a 12 week period, eight of those weeks he worked six day weeks and on more than one occasion worked for more than 10 hours in one day. Mr Singh's evidence said this had a big impact on his overall wellbeing because he did not have enough downtime. In addition, he found he did not have time at the weekend to spend with his friends or to go to the Temple or take part in his community.

[22] He also had financial concerns to the extent he had to borrow money from friends and family to meet his fixed living costs when his pay dropped because he had completed less than 35 hours that week. His representatives identified 25 weeks when he was paid for less than 35 hours of work and calculated this amounted to \$4,391.95 in wage arrears for failing to pay Mr Singh in accordance with his guaranteed hours.

[23] Mr Singh had another job at the same time he was employed by ATL and used this to top up his income from ATL where he could but given that he was required to work for ATL over seven days, he found it difficult to find time to pick up work with his other job and as a consequence he found himself becoming financially stressed, very tired and often with not enough money to cover his fixed costs.

[24] When Mr Singh was first employed, he was on an open work visa. Mr Singh gained his New Zealand residence status in June 2022 which gave him the confidence to seek new employment and resign from ATL. He gave notice on 5 July 2022 and his last day of employment with ATL was 17 July 2022. He says he was not paid his final weeks' pay and did not receive a final pay with his holiday entitlements. Mr Singh messaged Ms Ure by email, phone and text on more than one occasion. He says Ms Ure responded only once saying she would sort out his final pay as soon as possible but she never did and his bank statements confirm this. His last payment from ATL was on 11 July 2022. Mr Singh's application was lodged in the Authority on 15 November 2022 seeking orders for unpaid wage and holiday arrears and penalties.

Wage arrears

[25] Where there has been a default in payment to an employee of wages an employee may bring a claim for recovery of arrears.³ Mr Singh seeks arrears because he was not always paid the guaranteed minimum 35 hours a week provided for in his IEA. I am satisfied his employment was on a permanent full-time basis. The letter of offer refers to the position being permanent and full time and the payment of wages clause in the IEA between the parties states “the employee will be paid a full-time wage of 35 hrs a week minimum ...”

[26] The evidence lodged in the Authority shows Mr Singh’s work pattern was irregular and his weekly hours ranged from 15 to 53 hours based on a selection of his time tracking application records. Analysis of his pay slips and bank statements confirms there was a shortfall in wages because they show there were weeks he was paid for less than 35 hours.

[27] Mr Singh’s pay rate increased twice during his employment. Mr Singh found out about these changes through his payslips. He was paid \$23.00 per hour from the start of his employment to 22 June 2021. The rate increased to \$24.00 per hour from 22 June 2021 to 29 May 2022 and \$25.00 per hour from 29 May 2022 to 17 July 2022.

[28] Because of the way the IEA was worded, when Mr Singh worked less than 35 hours he was entitled to be paid for 35 hours. He is therefore able to recover those underpayments as arrears. The total in wage arrears owed for guaranteed hours has been calculated from his bank statements using the relevant pay rate at the time. Mr Singh is owed 215.4 hours in wage arrears in the amount of \$4,391.95 over the course of his employment.

Annual holiday leave

[29] Where an employee’s employment has come to an end before annual leave has been taken an employer is obliged to pay annual holiday pay in the final pay.⁴

[30] Mr Singh claims arrears for his annual leave entitlement at the end of the employment relationship and for one week over the 2021 Christmas period when he was paid for the first week of annual leave but not for the second. When Mr Singh

³ Employment Relations Act 2000, s 131.

⁴ Holidays Act 2003, s 27.

asked Ms Ure why he was not paid for the second week, she told him she would pay him as soon as possible. This was leave taken in advance but agreed to by both parties. Mr Singh's ordinary weekly pay at the beginning of the annual holiday was \$24.00 per hour. The annual holiday pay arrears he is owed for one week's annual holiday pay was calculated by Mr Singh's representatives as being \$840.00 (gross) and I accept that calculation.

[31] Mr Singh's last pay slip shows the outstanding amounts of 99.23 hours annual leave available, and 40.21 hours accrued. While Mr Singh's IEA incorrectly stated he was entitled to two weeks annual leave each year I have compared the payslips with the IR summary of earnings and I am satisfied the payroll application calculating Mr Singh's entitlement was in accordance with the correct statutory entitlement of four weeks per year. Mr Singh's final rate of pay was \$25.00. I accept the calculation provided to me that Mr Singh is owed \$3,486.75 in annual holiday arrears.

Public holiday pay

[32] Mr Singh is entitled to be paid in accordance with s 49 of the Holidays Act 2003 for any public holidays that fell on a day that would otherwise have been a working day.

[33] Mr Singh claims he did not work on any public holidays that fell on a working day during his employment because his regular work schedule was rearranged before each public holiday and he was instructed to take the day off and work at the weekend instead.

[34] It is also submitted on his behalf that over the Christmas period in 2021, when Mr Singh took two weeks of leave but was only paid for one, he was also not paid for the statutory holidays that fell in that week. Christmas Day and Boxing Day were a Saturday and Sunday that year and because he was on a 7-day roster, he was entitled to be paid public holiday pay for statutory holidays that fell at the weekend. I accept that submission to the extent s 45 of the Holidays Act provides for the transfer of those days to the following Monday and Tuesday which were days Mr Singh would have worked. There is insufficient evidence of regular work on either Saturday or Sunday to be satisfied those were days he would otherwise have been working.

[35] In 2021 there are seven public holidays after Mr Singh commenced work:

- (a) Good Friday (2 April 2021) (\$23.00 x 7 = \$161.00)
- (b) Easter Monday (5 April 2021) (\$23.00 x 7 = \$161.00)
- (c) ANZAC Day (26 April 2021) (\$23.00 x 7 = \$161.00)
- (d) Queens Birthday (7 June 2021) (\$23.00 x 7 = 161.00)
- (e) Labour Day (25 October 2021) (\$24.00 x 7 = \$168.00)
- (f) Christmas Day (27 December 2021) (\$24.00 x 7 = \$168.00)
- (g) Boxing Day (28 December 2021) (\$24.00 x 7 = \$168.00)

[36] In 2022 there were a further 8 public holidays before he departed:

- (a) New Years Day (3 January 2022) (\$24.00 x 7 = \$168.00)
- (b) Day after New Years (4 January 2022) (\$24.00 x 7 = \$168.00)
- (c) Waitangi day (6 February 2022) (\$24.00 x 7 = \$168.00)
- (d) Good Friday (15 April 2022) (\$24.00 x 7 = \$168.00)
- (e) Easter Monday (18 April 2022) (\$24.00 x 7 = \$168.00)
- (f) ANZAC Day (25 April 2022) (\$24.00 x 7 = \$168.00)
- (g) Queen's Birthday (6 June 2022) (\$23.00 x 7 = 168.00)
- (h) Matariki (24 June 2022) (\$25.00 x 7 = \$175.00)

[37] Adding these public holidays up at their individual rates calculated at seven hours (average minimum daily hours) amounts to \$2,499.00 in public holiday pay arrears.

Penalties

[38] Penalties are sought for failing to keep and produce wage and time records and for a clause in the IEA that is contrary to law. Section 65(2)(b)(i) of the Act requires that employment agreements do not contain anything contrary to law. The two-week annual leave entitlement per year is contrary to law and ATL will be liable to a penalty for that breach. ATL is also liable for a breach of the requirement to provide wage and time and holiday and leave records on the basis they were requested by Mr Singh and his representatives and not provided.

[39] There were some text messages provided to me that show last minute changes to the work schedule involving Mr Singh being required to work on the weekend. On one occasion Mr Singh was sick and he was required to work the weekend to make up the time. The text message from Ms Ure stated:

Monday was a precaution for your covid test, so that's not a sick day but the Friday correct, as you called in sick I shall apply that for you, but please note that if your sick Friday then work will be shifted to Saturday or Sunday for you to complete so that you can achieve your contract hours.

[40] Neither of the respondents participated in the Authority's investigation so I have no information from the employer, however, the text message above shows a lack of understanding that rostered days cannot be changed to another day with an expectation that an employee will work them without running into difficulty with the rules around availability provisions in the Act.⁵ The text also implies Mr Singh may have had no sick leave but looking at the final pay slip there was sick leave available meaning the lack of understanding extends to sick leave as well.

[41] In addition to the breaches above, the IEA between the parties did not specify days of work which is in breach of s 67C of the Act. Hours of work, the number of guaranteed hours, the days of the week on which work is to be performed, the start and finish times of work and any flexibility with those three things must be specified. ATL is also liable for this breach. ATL is also liable for two additional breaches for failing to pay holiday pay on termination of employment⁶ and failing to pay Mr Singh for public holidays.⁷

[42] In deciding whether to impose penalties and in what amount I need to consider the principles and approach set out by the Employment Court.⁸ Section 133A of the Act requires that regard is given to the object of the Act; the nature and extent of any breach; whether it was intentional, inadvertent or negligent; the nature and extent of any loss or damage, steps taken to mitigate the effects of the breach, circumstances of the breach, including the vulnerability of the employee and previous conduct.

⁵ Employment Relations Act 2000, s 67D.

⁶ Holidays Act 2003, ss 25 and 75.

⁷ Above n7, ss 49 and 75.

⁸ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143; *A Labour Inspector v Daleson Investment Limited* [2018] NZEmpC 110; *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110.

[43] The purpose of penalties is punitive. They are not imposed to remedy a loss but to punish the person who has breached a statutory duty and to condemn that behaviour. One of the objects of the Act is to promote the effective enforcement of employment standards. There is a duty to keep compliant wage and time and holiday and leave records and to provide these on request. An employee is also entitled to receive their minimum holiday and leave entitlements. Individual employment agreements must also specify the days on which work is to be carried out and not contain anything contrary to law.

[44] The Act allows for penalties to be imposed with the maximum penalty for a single breach by a company of \$20,000.00 and by an individual of \$10,000.00. With four types of breaches there is potential liability of \$80,000.00 for ATL and \$40,000 for Ms Ure.

[45] There is no previous conduct that the Authority is aware of. The respondents did not participate in the Authority's investigation. Given the focus in this case is on Mr Singh receiving wage and holiday pay arrears and the fact Ms Ure indicated to Mr Singh's representatives the company was going into receivership and it appears that threat is real with removal action underway in relation to ATL. I decline to award penalties in order to prioritise payment to Mr Singh of the wage and holiday arrears.

[46] If Mr Singh is in the position of needing to seek a compliance order under the Act due to default with payment of any monies ordered to be paid to him, by either ATL or Ms Ure, penalties can be awarded at that stage.

Is Ms Ure a person involved in the breaches?

[47] In the event ATL fails to make any payments ordered, Mr Singh's representatives have applied under of the Act to have Ms Ure named as a person involved in the breaches of employment standards. The Court of Appeal in *A Labour Inspector v Southern Taxis and Ors* settled the legal test regarding persons involved employment standards breaches under the Act:⁹

The level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) of the Employment Relations Act 2000 is knowledge of the essential facts that establish the contravention by the employer.

⁹ *A Labour Inspector v Southern Taxis and Ors* [2021] NZCA 705 at [59].

[48] I accept the submission that Ms Ure had knowledge of the essential facts. Ms Ure was the sole director and shareholder of the company. She recruited Mr Singh, signed the IEA on behalf of ATL, organised the work tasks, met with Mr Singh to discuss work, and directed which days Mr Singh was to work. Mr Singh emailed her the hours he worked each week and when there were problems with his wages, Ms Ure was the person he contacted. There was no one else. As the sole director of ATL Ms Ure is therefore responsible for record keeping and payroll and as a result I find she was directly involved in the breaches.

[49] That means Ms Ure will be liable in the event ATL defaults on payment of any amounts ordered as a result of the minimum standards breaches established in this determination.

Interest

[50] Mr Singh is entitled to an award of interest on the total arrears claimed including the holiday pay component. The Authority has the power to award interest.¹⁰ Interest is to reimburse someone for the loss of the use of monies to which there is an established entitlement. It is appropriate where a person has been deprived of the use of money to make an award for interest.

[51] ATL will be ordered to pay interest using the civil debt interest calculator¹¹ on the total amount outstanding from the 17 July 2022 until the date the money is paid in full.

Orders

[52] Arden Trading Limited is ordered to pay Sukpreet Singh the following sums:

- (a) Wage arrears for failing to pay guaranteed hours of \$4,391.95;
- (b) Annual holiday pay for one week of \$840.00;
- (c) Annual holiday entitlements owed at the end of employment relationship of \$3,486.75;
- (d) Public holiday arrears of \$2,499.00;

¹⁰ Employment Relations Act 2000, schedule 2, clause 11 and Interest on Money Claims Act 2016, schedule 2.

¹¹ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

- (e) Interest using the civil debt interest calculator on the total amount outstanding of \$11,216.95 from the date 17 July 2022 until the date the money is paid in full; and
- (f) Filing fee of \$71.55.

[53] Ms Ure is named as a person involved in the breaches by Arden Trading Limited and therefore liable in respect of the breaches of employment standards if there is a default in payment of the amounts in the orders above.

Costs

[54] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Singh may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum ATL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹²

Sarah Kennedy-Martin
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1